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ABSTRACT

This paper discusses pregnancy disability compensation policies. On December 7, 1976, the Supreme Court held in "General Electric v. Gilbert" that exclusion of pregnancy and pregnancy related disabilities from coverage under an otherwise comprehensive temporary disabilities plan was not a violation of Title VII's prohibition of discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of...race, color, religion, sex, or national origin." On March 15, 1977 Senator Harrison Williams introduced a bill S.995 "to make clear that the prohibitions against sex in Title VII also encompass and forbid discrimination based on pregnancy, childbirth, or related medical conditions." As of August 1978, the bill had not yet been passed. The issue of pregnancy disability compensation as dealt with by the Burger Court and the 95th Congress provides a clear case study of the way in which a complex issue has been molded differently by two institutional processes each with its own norms, rules, and procedures. This Paper looks at the kinds of information offered the Burger Court and the legislators of the 97th Congress by outside interests and the way the decision makers used this information to develop policies regarding pregnancy disability compensation. (Author/RM)

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WOMEN'S RIGHTS, COURTS AND CONGRESS: CONFLICT OVER PREGNANCY DISABILITY COMPENSATION POLICIES*

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On December 7, 1976 women's, civil rights and labor organizations felt the blow of an unanticipated event with important policy repercussions. That morning, the Supreme Court held in General Electric v. Gilbert[1] that exclusion of pregnancy and pregnancy related disabilities from coverage under an otherwise comprehensive temporary disabilities insurance plan was not a violation of Title VII's prohibition of discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment because of ...race, color, religion, sex or national origin."[2]

For the Court it was a question of legal definition and insurable risks. For the women and their supporters it was an ominous crack in Title VII's blanket prohibition against discrimination because it exempted a uniquely female condition. The Court was immediately denounced as a band of black-robed, male chauvinists still writing nineteenth century view's of women's roles into twentieth century policy. Said feminist lawyer Sue Ross: "Underlying the whole thing is the notion among employers that pregnant women are somehow obscene."[3]

The coalition of interests supporting Gilbert immediately turned to Congress for an explicit affirmation of its legislative intent in 1964. On March 15, 1977 Senator Harrison Williams introduced S.995 "to make it clear that the prohibitions against sex in title VII...also encompass and forbid discrimination based on pregnancy, childbirth, or related medical conditions."[4] His introductory speech emphasized congressional concern for the economic ramifications of the Gilbert decision in terms of family income, and women's positions in the labor market.

As of August 1978, the bill had been processed through House and Senate committees, passed each House and was being negotiated in conference committee. Prognosis for passage is doubtful, not because the original enthusiasm for language to incorporate pregnancy-related employment discrimination within Title VII has lessened, but because pro-life abortion interests successfully amended the House version to exclude elective abortions except to save the life of the mother. Imposition of this issue on a straightforward policy modification bill threatens to kill the basic bill.

Both the Court decision and the Senate bill are policy statements. The language of all participants - Justices, legislators, and interested groups - acknowledges their complementary policy roles. The situation presents an exceptionally clear example of self-conscious court-congress interaction in social policy making. There are several classic works examining such interaction, with the primary emphasis on the latter's activity.[5] A decade ago, Grossman and Wells[6] lamented the fact that research on Court decision-making focused primarily on decision-makers' personal impact on policy. They proposed examination of the relationships between policy process and output. In recent years, Horowitz,[7] Galanter,[8] Scheingold,[9] and Vose[10] have addressed the issue of court process, structure and policy making.

This paper seeks to build on their work by examining one aspect of policy making: the impact of congressional and Supreme Court rules and procedures for handling information on the definition of policy alternatives. The issue of pregnancy disability compensation as dealt with by the Burger Court and the 95th Congress provides a clear case study of the way in which

a complex issue has been molded differently by two institutional processes each with its own norms, rules and procedures. In this paper I shall look at the kinds of information offered Justices and legislators by outside interests, including other governmental entities, and the way the decision makers use it.

ISSUES

There are several forms of maternity discrimination: refusal of jobs to women who are or might become pregnant, pre- and/or post childbirth mandatory unpaid leaves, forced resignations or outright discharges, non-existent or limited medical and/or disability benefits, loss of seniority and other accrued benefits, and employer discretion regarding the times and conditions for re-employment. In addition unemployed pregnant women are often denied unemployment compensation, or state disability insurance. The impact of these maternity regulations on women's employment opportunities, career patterns and income levels becomes increasingly important in the context of expanded female participation in the labor force.

The labor force increased by 15 million from 1970 to 1977 with women accounting for 57% of that increase. In 1960, 38% of all women were in the work force compared to 48% in 1977. From 1970 and 1977 the proportion of working wives rose from 40% to 46%. Sixty percent of all working women are the sole support of their family or have husbands who earn $7000 or less. Yet two out of every three minimum wage earners in America are women. The earnings gap between men and women has increased rather than decreased: from 1939 to 1973 the earnings of fulltime full year white females fell from 61%

to 56% of white male earnings. At the same time the white female unemployment rate rose, relative to white males, from 10% higher in 1960 to 40% higher in 1974.[11]

Eighty percent of women workers became pregnant during their working lives; 40% of all pregnant women work during their pregnancies. Yet in 1973 maternity leave with pay was available to only 26% of women workers; pregnancy disability insurance covered only 14 million women workers.[12] Estimates on offering pregnancy disability and/or hospital maternity benefits to all working women range from the Department of Labor's estimate of $191 million additional to the insurance industry's high estimate of $1.6 billion.[13] Thus the cost factor is clearly an unknown but important consideration in any public policy decision on this issue.

However, from the women's perspective, these negative statistics reflect an incorporation of social assumptions about women in the workplace, which in turn, leads to persistent economic undervaluation of women workers, job segregation and lower pay scales.[14] Basic role expectations assume a sexual division of labor whereby men work for money, prestige and satisfaction and women perform the unpaid tasks associated with nuturance and housework. This assumption translates into sex stereotypes that limit women's employment opportunities and remuneration.

> *Women work for pin money rather than family necessities since men support them.
>
> *A woman's primary commitment is to her home not her job, therefore she will have higher rates of absenteeism and turnover, because family commitments will inevitably come first.
>
> *Women are temperamentally suited for jobs which use housekeeping skills, manual dexterity or sex appeal.

> *Pregnancy disability insurance will become severance pay because mothers will not return to work.

Benefit programs

> were founded on the notion that males, the presumed breadwinners, should be protected from income loss for physical incapacity....In sharp contrast, society has presumed that women - especially mothers - were not serious about staying on their jobs. Consequently, pregnant women are commonly left without disability or unemployment insurance...and when they recover, they often discover that they have no jobs to which to return.[15]

The self-fulfilling nature of such prophecies gives men first priority on available jobs, protects men from female competition, and distributes income so as to favor male heads of households.

These employment attitudes are not a cause but a consequence of public policy assumptions that the family is the basic unit of society. "From our housing patterns to our census forms, there is a normative expectation that one is a member of a nuclear family....Judging women as individuals is a serious threat to this normative pattern, and if realized in fact, would require some fundamental changes in virtually all our social institutions."[16] Note that the Bureau of Labor Statistics' family budgets are constructed for an average urban family with its 38 year old full time employed husband, a non-working wife and two children aged 8 and 13. However, only 6 million of 55 million American families fit this "typical family" stereotype.[17]

True labor force equality for men and women would mean not only an evolutionary expansion of employment opportunities, but also a revolutionary change in sex-based role assignments.

> The division of functions as between the sexes must be changed in such a way that both the man and the woman in a family are

> afforded the same practical opportunities of participating in both active parenthood and gainful employment....A policy which attempts to give women equal place with men in economic life while at the same time confirming women's traditional responsibility for the home and children has no prospect of fulfilling the first of these aims.[18]

Seen in this context the narrow issue of pregnancy disability insurance coverage generates great emotion and argument. It represents not only the monetary economic equality of equivalent benefit packages, but also the psychological equality implicit in the elimination of economic rules based on the female childbearing function.

> A study of the labor force history of women leads overwhelmingly to one conclusion: pregnancy - potential and actual - is the core from which radiates almost all the multitudes of images, suppositions, predictions, moral convictions, social preferences and stereotypes which form the justification for different and less favorable treatment of women in the workforce.[19]

The issue thus becomes one more piece in the current controversy over such public policies as the ERA, reproductive freedom and affirmative action.

ACTION

The Equal Employment Opportunity Commission (EEOC) was established by the Civil Rights Act of 1964 to implement Title VII. Under its original powers the EEOC could only investigate complaints, seek conciliation agreements and file amicus briefs. In 1972 its role was expanded with the addition of the power to file suit in cases of unsuccessful conciliation. From the beginning, the EEOC was understaffed, weak and deluged with complaints from aggrieved individuals. From the beginning, interest groups assumed the role of plaintiff in seeking court interpretation and application of Title VII; not only to secure an enforcement that the EEOC could not provide, but also

because the complicated procedures and time-consuming nature of the litigation required groups' money, manpower and expertise.[20]

Title VII as passed was more symbol than sword. It prohibited discrimination but didn't define it. It included sex discrimination in section 703(1) (a) and then added the bona fide occupational qualification (BFOQ) escape hatch in section 703 (e) which permitted exceptions to gender equality if they were reasonably necessary to the normal operation of the business. Thus it represented "a status quo attempt to eliminate barriers without upsetting the traditional United States economic structure or presumptions."[21] For feminists this was a frustrating situation since on the one hand Title VII represented a way to circumvent the judiciary's reluctance to protect women under the Fourteenth Amendment. On the other hand the BFOQ and scanty legislative history as to the reasons for adding sex to Title VII meant feminists would have to actively participate in its application and implementation.

Perhaps the EEOC could have pursued the statutory definition of sex discrimination alone, but this seemed highly unlikely in 1965. The agency did not initially define its mandate in terms of equal effort on behalf of race and sex discrimination, but put its efforts into the former. Feminist group pressure was necessary to force reexamination of initial agency rulings which merely accepted the status quo created by state protective legislation and employer pregnancy requirements.[22]

Development of pregnancy guidelines is a case in point. Due to staff inclination and agency weakness initial pregnancy rulings did not challenge the status quo. Pregnancy was classified as a unique experience which did

not need to be included in disability compensation plans. Only in 1970-71 did the agency commission a series of studies on treatment of pregnant employees with the result that it was not until April 1972 that guidelines were issued requiring that pregnancy and related conditions be treated as temporary disabilities for employment purposes.[23] During the next two years these guidelines were used as the model for Health, Education and Welfare pregnancy guidelines, Department of Labor suggested guidelines, and state human rights laws.

To force implementation of the guidelines the EEOC filed approximately 130 suits related to pregnancy benefits and found at least 250 companies in probable violation of the law.[24] The EEOC has also been an amicus in private litigation brought by the National Teachers Association and feminist groups interested in securing private employer compliance with the guidelines. Indeed, as soon as the EEOC was granted litigating powers it entered an amicus brief in Cleveland Board of Education v. La Fleur[25] on behalf of two Cleveland, Ohio school teachers who were challenging their school board's policy of mandatory maternity leave. This became the first maternity employment rights case to be accepted by the Supreme Court. EEOC amicus briefs also supported the women plaintiffs at all three levels in the Aiello,[26] Gilbert and Liberty Mutual[27] pregnancy disability benefits cases. Gilbert was especially important because it was the first case brought under Title VII which could involve a specific, substantive Court decision on the validity of the pregnancy guidelines. Signaling the importance of this case for the women's rights position, Assistant Attorney General Pottinger participated in oral argument in addition to providing amicus support.

The traditional theory is that groups that lose in Congress turn to the Court,[28] but in the case of feminists that is inaccurate. From 1963 to 1974, feminist issues enjoyed considerable legislative success. Coincident with the first stirrings of a women's movement, Congress incorporated anti-discriminatory provisions in the Civil Rights Act of 1957, the Jury Selection and Service Act of 1968, the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. As feminist organizations developed to raise public consciousness concerning sex discrimination and lobby for remedial legislation, the 92nd Congress responded with an avalanche of sex discrimination legislation including the 1972 Equal Employment Opportunity Act, the Educational Amendments Act, the Equal Rights Amendment.[29]

The need for a constitutional amendment to make sex discrimination unconstitutional indicates the Court's unwillingness to grant women legal equality under the guarantees of the Fourteenth Amendment.

> The history of challenges under the Fourteenth Amendment is a catalogue of dicta positing essential differences between the female and the male who sits on the bench. Discrimination against women is labeled care, protection and humanitarianism ....The only occupation for women that the law contemplates is willing sexual partner to her husband, childbearer, housekeeper, and child-socializer.[30]

Until 1971 the Court always accepted sex as a legitimate classification within the rubric of the rational basis standard for judging claims under the equal protection clause of the Fourteenth Amendment.[31] Rather than judge sex as a suspect classification comparable to race, the Justices considered sex discrimination issues in the context of social roles, and declined to change the male wage earner/female homemaker division of responsibilities.

The Burger Court has not moved far from these traditional attitudes but in a dramatic break with precedent, in Reed v. Reed, it used the rational relationship test to invalidate a state statute as sex discrimination under the equal protection clause.[32]

The case raised women's hopes of success in the Burger Court.[33] Specifically litigation-oriented groups were created such as Human Rights for Women, NOW Legal Defense and Education Fund, Women's Equity Action League (WEAL), and the Women's Rights Project of the ACLU to seek realization of their legislated opportunities. These groups used the court system to develop sex neutral interpretations of state protective legislation, want ad classifications, and other employment issues which the EEOC was loathe to reform alone. Maternity benefits cases were part of this overall pattern.

In the early 1970s the National Education Association (NEA) helped pregnant teachers challenge a variety of mandatory leave policies throughout the country. Since the scope of Title VII did not include governments as employers until 1972, these cases were brought under the equal protection clause of the Fourteenth Amendment. In April 1973, the Supreme Court granted certiorari to the first cases raising the issue of sex discrimination in maternity policies.[34] Jo Carol La Fleur, represented by WEAL lawyers, and Susan Cohen, assisted by NEA, sued the Cleveland Board of Education and the Chesterfield County School Board respectively, challenging the five month mandatory leave provision in each district as violative of the equal protection clause.

In the La Fleur case the Appeals Court reversed a District Court decision in favor of the school board, citing, as one factor in the decision, events since the District Court opinion: a fifth circuit opinion on pregnancy leave, passage of the 1972 amendments to Title VII, and the Supreme Court's finding of sex discrimination in Reed v. Reed.[35] In Cohen, the appellate court also reversed its district court, but here Judge Haynesworth found no invidious discrimination because there is no competition. "Only women become pregnant....How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course."[36]

At both the appellate and Supreme Court levels the feminist position was explained in amicus briefs by NEA, WEAL, ACLU, EEOC and the United Automobile Workers Union (UAW). At the Supreme Court level, the California Department of Human Resources, having recently lost in the maternity benefits case of Aiello v. Hansen,[37] entered an amicus brief, as did two supporters of the Chesterfield County School Board - its own State of Virginia and Delta Airlines, recently involved in similar maternity/employment litigation. The Supreme Court decision sidestepped the entire socio-economic issue by ruling on due process grounds that mandatory leaves have no valid relationship to the state's interest in instructional continuity and furthermore, create a discriminatory irrebutable presumption that pregnant women are incapable of work after the fourth month of pregnancy.

Six months later the Court issued the next in its series of decisions written to avoid the socio-economic issues: Geduldig v. Aiello.[38] Carolyn Aiello and three other women sued the Director of the California

Department of Human Resources because pregnancy benefits were the only temporary disability exempted from coverage under the California disability insurance system which pays benefits to private company employees temporarily unable to work due to disabilities.

Feminist lawyer Wendy Williams briefed both the District Court and the Supreme Court on the stereotypic role models incorporated in such exemptions, statistics related to its impact on working women, and the legal arguments supporting classification of sex discrimination as a suspect category eligible for the Court's strict scrutiny equal protection review standard.[39] California argued social welfare and cost issues related to the State's interest in keeping the fund self-sustaining while maintaining employee contributions at the lowest possible level. The District Court decision incorporating the Aiello brief's arguments, used the strict relationship test developed by the Supreme Court in Reed to find that "exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose...."[40]

Justice Stewart, writing for the Court in both Aiello and La Fleur, once again avoided the sex discrimination policy aspects of the case. Here the facts did not lend themselves to use of a due process by-pass, so he relied instead on the rational basis equal protection test traditionally used to analyze state social welfare policies. His entire opinion is couched in the insurance jargon of 'risks', 'benefit levels', and 'annual claim rates'. Accepting state purposes in the maintenance of a self-sustaining, low-cost program, he found that: "There is no risk from which men are protected and women are not. Likewise there is no risk from which women are

protected and men are not."[41] Indeed, risks not pregnancy are the subject of the majority opinion. This is the lesson of famous footnote 20:

> The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition - pregnancy - from the list of compensible disabilities. While it is true that only women become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in Reed....The program divides potential recipients into two groups - pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[42]

Footnote 20 reads sex-unique characteristics out of the parameters of the equal protection concept. The even-handed treatment of similarly situated individuals, which evolved as the typical racial application of the equal protection clause, is preserved.

Justice Brennan's dissent focused on the sex discrimination features of the exemption using the strict scrutiny standard of the Frontiero plurality opinion. Citing the state's purpose as the cushioning of income loss from disabilities, the dissenters found no compelling reason for exclusion of economic effects of pregnancy related disabilities which "are functionally indistinguishable from the effects caused by any other disability: wages are lost...and medical expenses are incurred...."[43] To use the risk terminology of the majority opinion, one category (men) is covered for all possible disabilities, the other (women) is not. The dissent's reasoning indicates that, "If the Court had looked seriously at the relationship between the kind of sex stereotyping embodied in a pregnancy classification like the one in Aiello, and the economic and social status of women, its conclusion might have been different."[44]

Even though the "Supreme Court specializes in public policy conflicts...."[45] public policy pronouncements are still basically by-products in an adversarial process which requires decisions legally binding only on the individual fact situation before the Court. Consequently, an accumulation of complementary fact situations are required before interested policy makers can infer a general judicial policy position. Announcement of the Aiello decision, placed the Court ambiguously mid-way in its development of the maternity benefits issue. In search of its policy implications, various law review articles explored possible ramifications of Aiello for development of Title VII's sex discrimination prohibitions.

> If the Supreme Court really means that the treatment of sex-peculiar characteristics does not give rise to sex discrimination at all, then even under the far stricter standard of review used for Title VII it is hard to see how a court could reach the issue of the employer's justifications because the statutory ban will not have been violated.[46]
>
> Surely sex discrimination cannot mean one thing for equal protection purposes and another for Title VII.[47]

Lower courts were also working through the legal and policy issues involved in maternity benefit questions. By September 1976, eight circuit courts of appeal and seventeen district courts had ruled that Aiello should be distinguished in cases interpreting statutes and upholding the EEOC guidelines requiring employers to include pregnancy and related conditions on the same terms as other temporary disabilities for purposes of disability compensation plans. Their rationales varied. Some related pregnancy to the protected fundamental right to bear children, or defined it as a denial of equal protection under the Fourteenth Amendment and/or Title VII.

Others emphasized the reality of working women's economic needs and job inequities, tieing these conditions to the operative effects of pregnancy-based employment policies. Others dismissed the matter as mere common sense, dispelling contrary assertions with Thomas Reed Powell's aphorism: "If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind."

Nevertheless, it's important to note in context of judicial policy making, that none of the Court took the next philosophical step, the feminist step, and connected maternity employment practices with women's views of their possible options. None related stereotypes to personal and social standards of permissible activity which relegated women to second class, second rate economic participation.[48] In other words, none took the giant step from incremental rights to revolutionary changes in the social order. The judicial decision making process neither required nor facilitated such inclusive considerations.

The Supreme Court also failed to take this intellectual step. Dean of the feminist lawyers, Ruth Bader Ginsburg, suggested that the analogy of pregnancy to other disabilities was rejected in Aiello because the Justices saw pregnancy "as an integral part of a long-term process...ending years later when child rearing work is done."[49] In this sense, La Fleur and Aiello reaffirm an attitude first intimated in Phillips v. Martin Marietta (1971),[50] the first Title VII sex discrimination case accepted by the Court.

Ida Phillips sued Martin Marietta for refusal to accept her job application because she had pre-school age children. In a per curiam

opinion the Court held that Title VII "requires that persons of like qualifications be given employment opportunities irrespective of their sex;"[51] i.e., separate standards for male and female parents of pre-school children are illegal. However, the Court's opinion of motherhood and employment responsibilities was foreshadowed in its suggestion that family obligations might be an acceptable BFOQ "if demonstrably more relevant to job performance for a woman than for a man...;"[52] an opinion Justice Marshall criticized as reflecting an "ancient canard about the proper role of women...."[53] Thus by the time General Electric v. Gilbert reached the Supreme Court it was clear that feminist's had to make the Court take that extra step and rule on the place of sex-unique characteristics under Title VII.

General Electric v. Gilbert

By the time the Gilbert case reached the Supreme Court a congruence of political, social and legal pressures had made it an important policy test case. But its beginnings were more pedestrian. The testimony of Robert Gordon Delano,[54] shop steward at General Electric's Salem, Virginia plant, indicates that he saw a summary of the Cohen district court decision and suggested to the union hierarchy that a similar suit could be instituted against General Electric since the union had been unable to secure pregnancy disability compensation benefits through the collective bargaining process. Thus in December 1971 seven General Electric female employees, pregnant during 1971-72, filed charged with the EEOC alleging that the pregnancy exclusion clause violated Title VII.

When suit was brought in United States District Court for the Eastern

District of Virginia in March 1972 it seemed a simple case of court action to pressure non-court processes. The case was deliberately brought before Judge Merhige who had ruled favorably in Cohen. Other precedents were few, and congressional passage of the ERA and the 1972 Equal Employment Opportunity Act coupled with EEOC promulgation of its pregnancy guidelines suggested a favorable political environment for a pro-women decision. Judge Merhige did indeed find for the plaintiffs, but by the time of his spring 1974 decision the issue of sex role equality had become politically controversial.

In January 1973 Phyllis Schafly, launching her "Stop ERA" campaign, asked, "Why should we lower ourselves to 'equal rights' when we already have the status of special privilege?" Group opposition, created in response to the Court's 1973 pro-choice abortion decisions, lobbied for legislation or a constitutional amendment to reverse the impact of the decisions. Controversy enveloped other measures such as day care facilities and affirmative action programs. Judicial notice of the schisms and emotional confrontations is suggested in Justice Powell's statement justifying his refusal to move to a strict scrutiny analysis of sex discrimination. "(R)eaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes."[55]

Perhaps in view of the changing circumstances, the plaintiffs would have preferred to stop the process, but the choice was not theirs to make. Within the court system, any trial level loser is entitled to one appeal, and

General Electric appealed. In addition, the feminist/EEOC position had been weakened by the Court's vacillation in La Fleur and Aiello so they had a policy stake in securing a favorable Supreme Court response. Gilbert seemed the ideal case since it had amassed a voluminious trial record, plus an EEOC ruling and a detailed district court opinion.

Indeed this was General Electric's argument, when in an unusual move both parties petitioned the Supreme Court for certiorari before the Court of Appeals handed down its decision. Their brief asked the Court to include them with the Liberty Mutual case.

> Where, as here, there is a record of such completeness in a case pending in the court of appeals that it is likely to prove helpful to the Court in deciding a case already before it which presents the identical question, there is further good reason for the grant of certiorari.[56]

The Court accepted jurisdiction and oral argument was set for January 19 and 20, 1976. Both the offer and its acceptance suggest the increasingly important policy implications of the decision.

Another indication of increasing policy interest in the legal resolution of this issue was the growing list of amicus curiae briefs. Groups with an interest in the resolution of pending litigation petition to present these "friend of the court" briefs in order to present or emphasize specific aspects of the case. They also serve the court as an index to relevant political and social responses. In Aiello, six amicus briefs supported each side: the EEOC, ACLU, AFL-CIO, International Union of Electrical, Radio and Machine Workers (IUE), WEAL and the Physicians Forum for Aiello: the Chamber of Commerce, NAM, AT&T, General Electric, Pacific Legal

Foundation and Merchants and Manufacturers Association for the State of California. This roster illustrates a typical amicus mix: several appellants/ appellee in related cases - IUE, WEAL, General Electric, AT&T, and several personally interested interest groups - ACLU, AFL-CIO, Chamber of Commerce NAM, and Merchants and Manufacturers Association.

Most of these groups continued to support the Wetzel and Gilbert cases. Briefs supporting the women in one or both cases were entered by: The EEOC, ACLU, AFL-CIO, Communication Workers of America, NOW, Human Rights for Women, WEAL, the Center for Constitutional Rights, the Women's Law Project, NEA, the States of New York, Massachusetts, and Ohio, and the school district of Ladue. Supporting the corporations were the United States Chamber of Commerce, the NAM, the American Life Insurance Association, the American Society for Personnel Administration, American Mutual Insurance Alliance, AT&T, General Motors, Westinghouse Electric Corporation, Owens-Illinois, Celanese Corporation, and a joint brief for twenty-two domestic airlines.[57]

To illustrate the supportative function of the briefs: the ACLU/NEA Wetzel brief carefully analyzed alternative methods for circumventing Aiello in order to maintain Title VII's sex discrimination prohobitions; the Women's Law Project brief in Gilbert is written by three of the authors of a famous Yale law review article explaining the rationale and impact of the ERA, in order to refute business interpretations of that article's use during congressional debates on ERA. The American Society for Personnel Administration documents the disasterous financial impact of pregnancy

disability insurance for public employers; AT&T provides data it developed during its own EEOC case. In some cases these are intellectually necessary supplements to the central pleadings. Here they are politically suggestive intellectual icing on an enormous data cake.

Preparation for the Gilbert court trial took fifteen months, not only because of tactical delays, but also due to the volume of data. Fifteen witnesses at the trial produced 654 pages of testimony which was supplemented by 126 Gilbert exhibits, and 60 General Electric exhibits. IUE's exhibits included minutes of union bargaining meetings, copies of settlements, contract language changes; excerpts from books and annual reports illustrating the male bias inherent in General Electric's insurance plans; statistics and articles documenting relationships between women, work and pregnancy, and the breakdown of male and female hourly earnings in General Electric plants in 1972. General Electric's exhibits included cost estimates, copies of other income disability plans, government regulations and memoranda related to maternity leave and a series of documents pertaining to the AT&T EEOC case.[58]

The main briefs reflected the different factual interpretations and emphases of earlier briefs in Aiello and Wetzel. General Electric's argument is written to fall within the parameters suggested by the Court's reasoning in Aiello. After giving legal precedents and rationale supporting its applicability to this case, the brief then goes on to show the absence of a discriminatory pretext and the sound business reasons which justify its insurance coverage. The brief also emphasizes the unique, voluntary nature of pregnancy, and seeks to undermine the importance to be given

congressional intent or EEOC guidelines in deciding the issue. Basically General Electric seeks a 99% legally oriented decision which would preclude reaching the merits of the sex discrimination issue.

By contrast, most of the IUE brief emphasizes the discriminatory aspects of the insurance plan within the discriminatory history of General Electric's entire labor policy and the larger issue of the discriminatory impact on working women. Medical testimony on pregnancy as a disability for employment related purposes, refutation of General Electric's cost analyses, and an interpretation of congressional and EEOC decision making processes are all used to support a broad interpretation of Title VII's reach. It is a 155 page sociological, ancedotal "Brandeis brief" compiled to convince the Court that:

> Employer practices with respect to the employment of women during pregnancy have been one of the major causes of transciency of women in the market place, with accompanying long periods of unemployment, low wages and undesirable jobs.[59]

During oral argument, IUE lawyer Ruth Weyand requested permission to file a supplemental brief responding to misstatements she found in General Electric's reply brief. Justice Blackmun asked why, when she had already given them briefs totaling 250 pages, she wanted to add more. Weyand replied, that this was the first time the Court had dealt with the sex-unique characteristic issue under Title VII. "After we develop the law you can focus."[60] Weyand's oral argument emphasized the stereotypical sex role assumptions that were built into the General Electric plan, and its cost calculations which assumed women would malinger in order to gain more time with their new baby or just plain take the money as severance pay and not return to work.

Assistant Attorney General Pottinger argued that exclusion of pregnancy benefits is not a facially neutral policy since it "singles out a condition which is so inextricably sex-linked to women that it is tantamount to a policy of excluding women...."[61] Alternatively, he offered as a Court rationale, the impact theory developed in Griggs v. Duke Power Company since the effect of the pregnancy exclusion falls only on women. Justice Stewart asked him how he could advance these arguments in light of Aiello. Pottinger said Aiello could be distinguished since it was used to apply a constitutional test of rational relationship to a state social welfare program.

General Electric's lawyer argued that Aiello was controlling because its characterization of pregnancy as a unique condition meant that there was no discrimination in the treatment of similarly situated people. He also said that a finding against General Electric would mean the end of most employer insurance plans; and that even with the pregnancy exclusion the cost of female coverage is 170% that of males, with limited pregnancy coverage it would jump to 210% of that for men. Finally, he argued the gut social policy issue: "The ultimate decision here... really relates to the family unit. There is a father for every child and because the family unit is in the majority we are providing benefits for the largest number."[63]

Thus the evolution of the pregnancy benefits issue in the courts culminated in a clearly stated policy-role choice for the Justices. They could extend the line of legal precedent from Aiello and by so doing eliminate the need for judicial resolution of the value conflict issue. Or they could make a bold policy decision and legitimize the efforts of the EEOC and its feminist,

union and civil rights allies to eliminate a major impediment to sex neutral employment policies. Those who anticipated the latter avenue of decision overlooked or underestimated the Burger Court's consistent identification with the long-standing attitude that economic need should be different for women than for men, since women should eventually be full-time mothers. From Muller[64] to Hoyt[65] to La Fleur all Courts have assumed rather than considered the implication of the fact that gender discrimination cases are part of "a design based on the notion that social roles are preordained by sex, that woman's first job is wife and mother, man's doctor, lawyer or indian chief."[66]

But even if the Court were moved to break away from its traditional assumptions, Burger Court style would not lead to an obvious break with the past. Court watchers have commented often that the Burger Court is more subtly activist than its predecessor. Rather than attack policies head-on, it has contrived a more aggressive rational relationship standard for measuring them.[67] Sex discrimination has not been declared a suspect category, or even a fundamental right. It's still entitled only to the heightened rationality test, a test which does not require the preliminary finding of presumed misconduct which the women's advocates want. Thus, adding a conservative view of women's roles to a conservative approach to judicial policy making the Court's decision in Gilbert to hide behind Aiello comes as no surprise.

Justice Rehnquist, in his opinion for the majority, held that General Electric's exclusion of pregnancy benefits from its disability plan does not

violate Title VII because such exclusion is not gender-based discrimination. Citing Justice Stewart's equal risk coverage phrase from Aiello, Rehnquist defines the General Electric policy as facially neutral. Since the nature of pregnancy rather than the fact of pregnant women is the true basis of the exemption there is no sex discrimination. Indeed, General Electric's benefit ratio arguments are quoted approvingly to illustrate the lack of sex-based inequality.

Thus reliance on Aiello precluded a finding of sex-based discrimination and consequently precluded any TitleVII analysis of discriminatory patterns. In order to shore up this analysis Rehnquist shot down the opposing governmental opinion embodied in the EEOC guidelines. He found the guidelines in conflict not only with earlier EEOC rulings, but also with language in the Equal Pay Act, the Department of Labor guidelines implementing that Act, and the congressional debate on the inclusion of Equal Pay Act exceptions in Title VII.

Justice Brennan, again in dissent, began from the IUE assumption that pregnancy exclusions hamper women's economic progress as evidenced by the available economic statistics. Within his framework he found the history of past General Electric discriminatory patterns convincing, and the development of the EEOC guidelines over a period of eight years "consciensious and reasonable."[68]

Justice Stevens, in dissent, dispelled Rehnquist's legal dissertation by pointing out that Congress could not have relied on Geduldig language when enacting Title VII since Geduldig appeared a decade later. Thus the

constitutional holding does not control this statutory interpretation; common sense does.

> (T)he rule at issue places the risk of absence caused by pregnancy in a class by itself. (The classification is between persons who face a risk of pregnancy and those who do not.) By definition, such a rule discriminates on account of sex, for it is the capacity to become pregnant which primarily differentiates the female from the male.[69]

These three opinions stake out three separate positions on the possible policy continuum: the majority opinion at the industry end, the Brennan dissent at the sex equality end, and the Stevens opinion in a rational statutory interpretation middle.

REACTION

"When the Supreme Court argues that General Electric is fair because it denies benefits to pregnant males and females alike it gives new meaning to the symbol of blind justice."[70] Page one of The New York Times headlined: Supreme Court Rules Employers May Refuse Pregnancy Sick Pay: Women's Rights Movement is Dealt a Major Blow....[71] Reaction from the feminist, civil rights, labor coalition supporting Gilbert was shocked dismay and an immediate turn to Congress. Kathleen Peratis, director of the ACLU's Women's Rights Project said: "We bombed out in court, so we'll have to go to Congress....I think the prospects are good now that the Court has ruled, because the ruling is simply not fair and it's bad public policy."[72]

Those applauding the ruling also looked to Congress. James Kilpatrick's column, headlined, "Pregnancy Ruling Just Right" argued that within the framework of the judicial function there could be no other decision since the Court lacked any consistent legislative history to interpret.

> Given this record, what was the Court to do? Critics of the decision appear to want the Court to sit as a kind of super-legislature....But this is not the function of the Court. In any rational view, the Court's duty is to tend to its own knitting and to leave legislation to Congress.[73]

Consciousness of separate legislative and judicial functions was a common undercurrent in court decisions as well. Opinions explaining that Aiello precluded a decision on the issue of discrimination usually coupled this interpretation with an invitation for congressional action. For example, Appellate Judge Widener, dissenting in Gilbert, said:

> ...Geduldig was written with an eye to Title VII cases certain to come, not in a vacuum and not with self imposed blinders....If Congress wishes to legislate in favor of pregnant women, I see no constitutional impediment, legislatures have made less rational classifications for centuries. But, I submit, Congress did not so undertake in Title VII.[74]

In the January 1976 Gilbert oral argument Theophil Kammholz, attorney for General Electric, stated in his summary that the underlying question was "whether Congress, when it enacted Title VII, contemplated the obliteration of a pregnancy disability exclusion in every program then in effect."[75] The assertion led to the following colloquy:

> Mr. Justice Marshall: "Congress was using very broad and general language. Why should it have spelled out language on pregnancy disability?"
>
> Kammholz: "Congress has had sufficient time since the Aiello decision in which to act if it wanted to."
>
> Mr. Justice Stewart: "Has there been any proposed legislation to make the specific question here a matter of law?"
>
> Kammholz: "I am aware of none."[76]

In the majority opinion for Gilbert, Rehnquist argues that this lack of

explicit legislative history makes it logical to assume that Congress left 'discrimination' undefined for purposes of Title VII implementation, because it incorporated the established case law meaning of the term. Thus Aiello which deals "with a strikingly similar disability plan is quite relevant."[77] Justice Stevens destroyed this logic in his dissent: "Quite clearly Congress could not have intended to adopt this Court's analysis of sex discrimination because it was seven years after the statute was passed that the Court first intimated that the concept of sex discrimination might have some relevance to equal protection analysis. See Reed...."[78] These comments presented a clear invitation for congressional response; an invitation which the losing coalition and its congressional allies accepted with alacrity.

Congress

On December 14, 1976, a week after the Gilbert decision was announced, representatives of 50 women's groups, unions and civil rights organizations met to organize a congressional lobbying campaign.[79] They named their ad hoc group The Campaign to End Discrimination Against Pregnant Workers (hereafter shortened to Campaign...). Coalition leadership was drawn from the litigating groups: Ruth Weyand, IUE lawyer who argued General Electric in the Supreme Court, and Sue Ross, staff member of the Women's Rights Project, were elected co-chairs. A letter was circulated December 23, 1976 asking possible allies to join the Campaign... and/or help in the drive to secure "legislation assuring that prohibitions against sex discrimination in employment also prohibit discrimination because of pregnancy."

At the same time they distributed a Fact Sheet which set the arguments,

previously used on behalf of the pregnant plaintiffs, within the context of the Supreme Court set-back. It addressed the following issues: purpose of the bill, its urgency, consequences of not changing the Court's interpretation. It challenged major myths: "Don't most pregnant women have husbands to support them?", "Isn't pregnancy voluntary?", "What time period are we talking about?" The last third of the two page memorandum addressed industry's issues of mandatory coverage and cost. This sheet set the parameters of legislature debate. Little time was spent discussing the logic of the Gilbert decision. Congress accepted the judicial evasion of a social policy choice and began to deal directly with the circumvented issue.

Senator Harrison Williams, Chairman of the Senate Committee on Human Resources and its Subcommittee on Labor, and Representative Augustus Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, agreed to sponsor override legislation. A "dear colleague" letter was circulated on March 3, 1977 soliciting co-sponsors. The bills (S.995/HR 6075) were introduced at a joint press conference on March 15, 1977 with representatives of the Campaign... and other groups in attendance. The bill amends the definitions section of Title VII to make discrimination on the basis of pregnancy, childbirth and related conditions illegal in all matters relating to employment that are covered under Title VII. Specific reference is made to section 703(h), the Bennett Amendment, which includes Equal Pay Act exceptions within the scope of Title VII, in order to

counter Justice Rehnquist's interpretation of this section in Gilbert.[80]

The remedial purpose of the legislation was explicitly stated during Senate floor debate. Senator Javits called it "corrective legislation."[81]

> And so we are in pursuance of an intent which we legislated in 1964, simply saying to the Court, "This is what we meant and we mean it and, therefore, because you left us no choice, we are going to make clear to you in a separate statute that this is what we meant and what we mean today."[82]

Senator Hawkins stated the purpose as overruling the Gilbert decision.

> ...the narrow approach of the bill is simply to eliminate confusion by expressly clarifying that the definition of sex discrimination in Title VII includes pregnancy based discrimination.[83]

According to him, Congress became involved because

> Sherrie O'Steen went to her last forum, the Congress of the United States, and pointedly asked that this bill pass so that "no one will ever have to suffer as I suffered during the time of my pregnancy." ...On behalf of Sherrie O'Steen and all working women in America, I ask for your support of this legislation.[84]

Yet if it were just that simple there would have been no need for full-scale hearings in both Houses. The fact that Congress went through the full information gathering, decision ratifying routine of subcommittee hearings/subcommittee acceptance/committee acceptance and floor action suggests that the bill has important social welfare and economic consequences. These issues were drawn out in the hearings and then highlighted during the floor debates.

Senate subcommittee hearings were held April 26, 27 and 29, 1977, flanked by House subcommittee hearings April 6 and June 29. Despite committee attempts to secure a wide range of opinion the final cast of

characters seemed almost a carryover from the court process. There was testimony from Dr. Andre Hellegers and Paul Jackson, expert witnesses in court; Wendy Williams and Ruth Weyand, who argued the Aiello and Gilbert cases before the Supreme Court; Sherrie O'Steen the most disadvantaged of the Gilbert plaintiffs, and representatives of eight interest groups who participated as amicus curiae in the court process. Twenty-four organizations identifiable by letterhead testified, eleven appearing in each House. Government witnesses including the Assistant Attorney General for Civil Rights, Vice Chairman of the EEOC, Director of the Women's Bureau, Presiding Officer of the National Commission on the Observance of International Women's Year all testified on behalf of the legislation.

Curiously, the court winners, General Electric, AT&T, Liberty Mutual, and others, although invited, did not testify. They were represented by their trade associations: the NAM, Chamber of Commerce, Electronic Industry Association Industrial Relations Council, the American Council of Life Insurance and the Health Insurance Association of America. In addition, companies and states with experience administering pregnancy disability insurance either testified or responded to committee letters of inquiry, thereby providing the same data which had been available to the Court in Appendices to the briefs.

Clarence Mitchell director of the Leadership Conference on Civil Rights, the American Veterans Committee, the American Nurses Association, the American Public Health Association, the League of Women Voters, the YWCA, and Federally Employed Women, Inc.[86] all sent

statements in support of the legislation. Both the National Retail Merchants Association and the Americ.. Retail Federation testified against the bill.

Thus the subtle game of constituent numbers was played at the hearings. These two small business trade associations, backed by actuarial testimony from the Chamber of Commerce and counterpoint to the big industry voice of the NAM and Electronic Industry Association, painted a picture of financial affliction for all aspects of American industry if these bills passed. Testimony from Susan Ross, co-chair of the Campaign..., plus the statements from those prestigious, established women's and professional organizations and the backing of the Leadership Conference, were designed to place the women's arguments in the framework of accepted, expected, incremental, socially necessary change.

Congressional support for the legislation was implicit in the deployment of witnesses. Typically committees build their case by emphasizing certain facts during hearings. And so, co-sponsoring Senators opened each day of Senate hearings, followed by supportative testimony. Lead-off witness in the April House hearing was Wendy Williams, followed by Susan Ross and then Gilbert plaintiff Sherrie O'Steen. The final hearings on June 29 consisted primarily of testimony from the Electronic Industry Association and some of its member firms. Actually only one-quarter of the witnesses opposed the legislation, and most of them sought corrective amendments rather than straight elimination of the bill.

Some testimony presented data on the actual impact of the Court's decision: its impairment of EEOC's Title VII enforcement function; its

influence on other state and federal court decisions, and on collective bargaining negotiations. Most of the testimony was concerned with the future: costs to industry, consumers, family welfare, the health of newborn babies; and the reification or elimination of sex-based stereotypes that impede and prevent employment equality for women. Industry made the same kinds of cost-benefit arguments introduced in court. However, here the plethora of opinions and exaggerated assumptions of industry actuaries led legislators to discount their figures, and rely on the Department of Labor's estimate of a $228.9 million increase, (which amounts to a .05% increase in the total payroll cost of temporary disability insurance benefits for employees).[87]

Searching for other input, legislators focused on social welfare aspects of the bill as presented in the testimony of Sherrie O'Steen, the American Nurses's Association explanation concerning the relationship between finances and prenatal health, or the IUE's discussion of General Electric's imbalanced hospital insurance payments.

> The wives of male General Electric employees have half again as many babies as General Electric's female employees.... The cost to General Electric for babies of wives of male employees is so much greater than the cost for female employees that General Electric could pay each female employee six weeks of disability benefits plus hospital and medical expenses and still spend less money per capita per female employee on procreation costs than it spends per capita on male employees.[88]

Such data is immaterial and irrelevant in the court system but essential for congressional coalition building behind a social welfare measure.

Thus it should come as no surprise that groups interested in the other female reproductive issue - abortion - would appear here. Representatives of American Citizens Concerned for Life (a member of the Campaign...

coalition) testified in both Houses in support of the bill as a pro-life measure.

> ...Gilbert poses a threat to the security of the American family unit....When a woman is faced with losing her income... because of pregnancy, her decision to abort cannot be said to be the product of free choice but of economic coercion. A failure to reverse Gilbert ...sanctions this economic coercion. The continued existence of unborn human life is then made dependent upon the outcome of a cost-benefit analysis. This is a social evil ....[89]

The Bishops' Committee for Pro-Life Activities sent a letter to both committees commending the bill as "a matter of social justice" and requesting the addition of language eliminating elective abortions from the definition of covered conditions.[90] Campaign... leaders, drawn from the logical world of the law, has assumed incorporation of pro-life groups within the coalition would prevent this action. From their perspective it was an irrelevant issue in the context of disability programs because most plans begin with hospitalization or the eighth day of disability and abortions are usually done in day visits to a clinic. Also 21 states require pregnancy disability payments without any abortion exception. Finally, since loss of income forces many low income women to opt for an abortion, the bill may be viewed as a pro-life bill.

The Bishops' request was part of a broader pro-life strategy to append abortion amendments onto all social welfare measures in order to publicize the issue and simultaneously generate support for a constitutional amendment which would remove this emotional topic from the legislative arena. If the pro-life forces succeeded they could divide the Campaign... coalition. Without coalition pressure and/or with strong pro-life pressure the bill could become too politicized to pass.

In 1977 the anti-abortionists seemed stalemated. The Senate defeated the Eagleton amendment eliminating elective abortion from the law, and also Hatch's amendment putting a six weeks cap on pregnancy disability benefits in order to control the cost. On September 16, 1977, when the bill passed the Senate, 75-11, its definition was intact, clauses had been added to soften its immediate impact by permitting a six month period for adjustment of fringe benefit programs and the apportionment of costs under currently existing formulas, with the proviso that no company could reduce current benefit levels to meet the new obligations until one year after enactment or at the expiration of their current collective bargaining agreement.

In less than nine months Gilbert corrective legislation was through the Senate; it took ten more months to get it passed by the House. Other issues such as the anti-recession measures and the Humphrey-Hawkins bill caught the committee's attention. Other issues such as the ERA extension took Campaign... members attention. Nevertheless, coalition action, using traditional lobbying techniques, kept the issue alive. The Campaign... pursued public education through letters to the editor, articles in house organs and magazines such as the November 1977 article in Women's Day, and a half-hour videotape of the hearings, etc., for use on local television.

At key decision points they asked member organizations to write key legislators and visit them during home recesses. Printed postcards were distributed widely so that citizens need only sign their name and donate a stamp in order to contact their representative. Two action/information pieces were also distributed by the Campaign... and by the NOW Legal

Defense and Education Fund.

In February the House subcommittee marked up HR 6075 rejecting the Beard abortion amendment by two votes; on March 13, 1978 the full committee overruled the subcommittee, adopted the Beard amendment by seven votes, and then voted to report the bill as amended, 25-6. The next five months were spent maneuvering to remove the amendment and/or obtain a floor vote. Eventually, in a last minute decision, the House leadership decided to bring HR 6075 up under "suspension of the rules" a procedure used to expedite noncontroversial legislation. Bills called up under this rule are not amendable and must receive a two-third's vote to pass.

The House leadership interested in the bill and leaders of the Campaign... coalition supported the play as a way to move the bill to conference committee where they might stand a chance of eliminating the abortion amendment. NOW, NARAL and others opposed such use of the suspension procedure fearing that it would set a precedent for future abortion votes. Use of the suspension procedure and the propriety/appropriateness of an abortion amendment to this statutory revision legislation dominated the House floor debate.

Indeed, in the roll-call vote on the issue, many no votes were in opposition to the anti-abortion language rather than the pregnancy disability issue.[91] As of August 1978, the bills are in conference with House members standing adamantly behind the Beard amendment which Senate conferees are unwilling to accept. The stage is set for another anti-abortion donneybrook.

CONCLUSION

In strictly legal terms abortion and pregnancy disability insurance coverage have nothing in common. In strictly political terms they are two facets of the reproductive freedom issue with everything in common. In structural terms, the entrance of abortion as an intervening legislative variable, that may kill the pregnancy disability compensation bill, dramatically illustrates differences in the collection and processing procedures of Congress and the Supreme Court.

The rules of judicial procedure are designed to insure equality between participants. Court attention is focused on issues as framed by the litigants. Each side presents rationally related arguments pertaining to their desired objective regardless of its distortive impact on the policy area implicit in the case. This is judically fair because a court's opinion legally applies only to the factual situation at issue. The mandated judicial requirement for decision is not accompanied by a similar need to deal with the total picture. Thus the legal framework permits a distance between the case and larger social problems inherent in it.

This distance is accentuated by the psychological insulation created by judicial norms, customs, even architecture, which reify the postulated apolitical character of legal decision making. Notions of neutral law and impartial lawmakers are further reinforced by precedent oriented decision making guidelines. The legal rules narrow the range of possible alternatives and at the same time permit judicial flexibility in picking explanations to support a chosen conclusion. Norms and processes conspire to reward

Justices who legally and logically define only selected segments of an issue.

Thus in the case of the pregnancy disability insurance issue the Burger Court perceived its role not as social policy making but rather as continued development of a judicial mode for dealing with sex discrimination.[92] The line of reasoning from La Fleur to Aiello to Gilbert can be seen as a search for ways to legitimize the notion of sex discrimination without taking the next step and legitimizing flexibility in family lifestyles. Whereas the Warren Court might have jumped to the second step, the Burger Court moved only cautiously and conservatively down the path of rights development. "The Burger Court tends to choose to frame issues narrowly, whereas the Warren Court chose to frame them broadly. The Courts differ less in how to resolve issues than in how to frame them in the first place."[93]

The Supreme Court deliberately sidestepped the policy issue and invited Congress to act. Congress with its institutional mission to aggregate and conciliate competing interests is more prepared to pass broadly symbolic legislation, such as Title VII, and then revise it later after administrative and judicial decisions have filled in the details. The nature of the congressional function allows, even requires, consideration of factors outside judicial purview.[94] The Senate report supporting S.995 says: "The most important impact which this legislation will have is the substantial reduction of discrimination against women in our workforce." (emphasis added.)[95]

At the same time Congress restored the pre-existing understanding among those party to the policy making process. As Representative Thompson explained during floor debate: "This bill is necessary because

of a ruling by the Supreme Court in General Electric....HR 6075 seeks only to clarify what was the original intent of Congress in enacting the Civil Rights Act of 1964...." (emphasis added.)[96] The legislative function presumes such broad policy choices, while the judicial function is traditionally limited to their ratification. Thus, study of the impact of institutional norms and processes on a policy product suggests that perhaps civic textbook notions of legislative compromise and judicial neutrality may contain a kernel of truth.

Footnotes

1. General Electric v. Gilbert, 429 U. S. 125 (1976).

2. Title VII, Civil Rights Act of 1964 as amended (78 Stat 253, 86 Stat. 103, 42 USC s2000e, et seq.

3. quoted in the New York Post, December 23, 1976. Sue Ross is a well-known feminist lawyer, staff attorney of the American Civil Liberties Union Women's Rights Project, co-chair of the Campaign to End Discrimination Against Pregnant Workers and one of the authors of the casebook, Sex Discrimination and the Law: Causes and Remedies (Boston: Little, Brown, 1975).

4. Reprinted from the Congressional Record, 95th Congress, 1st Session, March 15, 1977 (daily edition).

5. See Walter Murphy, Congress and The Court (Chicago: University of Chicago Press, 1962); C. Herman Pritchett, Congress vs. The Supreme Court 1957-60 (Minneapolis: University of Minneapolis Press, 1961); Donald Morgan, Congress and The Constitution (Cambridge, Massachusetts: The Belknap Press, 1966); Robert J. Steamer, The Supreme Court in Crisis: A History of Conflict (Massachusetts: University of Massachusetts, 1971); J. Schmidhauser and Berg, The Supreme Court and Congress (1972).

6. Richard Wells and Joel Grossman, "The Concept of Judicial Policy-Making: A Critique", 15 Journal of Public Law 286 (1966).

7. Donald Horowitz, The Courts and Social Policy (Washington, D.C.: Brookings Institution, 1977).

8. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change", 9 Law and Society Review 95 (1975).

9. Stuart Scheingold, The Politics of Rights: Lawyers, Public Policy and Political Change (New Haven: Yale University Press, 1974).

10. Clement Vose, Constitutional Change (Lexington, Massachusetts: D.C. Heath & Co., 1972).

11. These statistics are from a variety of sources. Data on the earnings gap and unemployment rates are from Lester Thurow, "The Economic Status of Minorities and Women", 8 Civil Rights Digest 6 (Winter-Spring, 1976); general trends statistics from The Daily Times May 14, 1978. See also Why Women Work and Women Workers Today both published by U.S. Department of Labor, Women's Bureau, 1976.

12. Washington Post, September 21, 1977.

13. U.S. Senate, Subcommittee on Labor, Committee on Human Resources, Hearings: Discrimination on the Basis of Pregnancy, 1977, 95th Congress, 1st Session, April 26, 27, 29, passim. Hereinafter cited as Senate Hearings.

14. See "The Myth and the Reality," (U.S. Department of Labor, Women's Bureau, May, 1974); and Faith Seidenberg, "The Submissive Majority: Modern Trends in the Law Concerning Women's Rights," 55 Cornell Law Review 262 (1970).

15. Comment, "Geduldig v. Aiello: Pregnancy Classifications and the Definition of Pregnancy," 75 Columbia Law Review 441 at 443 (1975). Hereinafter cited as "Comment: Pregnancy Classifications".

16. Jo Freeman, "Women and Public Policy," (mimeo, undated), p. 28.

17. Carolyn Shaw Bell, "Should Every Job Support a Family?", 40 The Public Interest 109 at 114 (Summer, 1975).

18. Mary Eastwood, "Fighting Job Discrimination: Three Federal Approaches" The Law and Women Series No. 1, (Washington, D.C.: Today Publications, 1971), p. 27-8.

19. Testimony of Georgetown law professor Wendy Williams, House of Representatives, Subcommittee on Employment Opportunities, Hearings: Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy, 95th Congress, 1st Session (April 7, 1977), p. 21. Hereinafter cited as House Hearings.

20. See Equal Employment Opportunity: An Overview of the Legal Issues National Association of Attorneys General, Committee on the Office of Attorney General, (December, 1974); Legal Service Manual for Title VII Litigation, (New York: Employment Law Project, revised May, 1972).

21. Mary Dunlap, "A View of Sex Discrimination Cases Under Title VII: Making It Work," in Women and the Law: Symposium on Sex Discrimination (Philadelphia: Temple University School of Law, March, 1976), p. 86.

22. See Jo Freeman, The Politics of Women's Liberation (New York: David McKay Co., Inc., 1975), chapter 6; and Carolyn Bird, Born Female: The High Cost of Keeping Women Down (New York: David McKay Co., Inc., 1968), chapter 1.

23. Title 29, Chapter XIV, Part 1604.10 of the Code of Federal Regulations (b.) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection

with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sock leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. (Issued April 5, 1972).

24. Business Week, November 29, 1976, p. 41.

25. Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

26. Geduldig v. Aiello, 417 U.S. 484 (1974).

27. Wetzel v. Liberty Mutual Insurance Co., 424 U.S. 737 (1976).

28. See David Truman, The Governmental Process (New York: Knopf, 1971), pp. 487-494; Herbert Jacobs, Justice in America, (Boston: Little, Brown, 2 ed., 1972), p. 134-5.

29. See Jo Freeman, The Politics of Women's Liberation, chapters 6, 7; Irene Murphy, Public Policy on the Status of Women (Lexington, Massachusetts; D.C. Heath & Co., 1973), chapters 2, 3.

30. Barbara Cavanagh, "A Little Dearer Than His Horse," 6 Harvard Civil Rights--Civil Liberties Law Review 260 at 262-263 (1971).

31. For excellent summaries of the Court and sex discrimination see "Sex Discrimination and the Constitution," 2 Stanford Law Review 691 (1950); John Johnston, Jr. and Charles Knapp, "Sex Discrimination by Law: A Study in Judicial Perspective," 46 New York University Law Review 675 (1971); John Johnston, Jr., "Sex Discrimination and the Supreme Court, 1971-1974," 49 New York University Law Review 617 (1974); John Johnston, Jr., "Sex Discrimination and the Supreme Court, 1975", 23 UCLA Law Review 235 (1975); Judith Baer, "Sexual Equality And The Burger Court ", Western Political Quarterly (forthcoming); F.L. Morton, "Sexual Equality and the Family in the Supreme Court," Presented at the 1977 convention of the American Political Science Association (mimeo).

32. Reed v. Reed 404 U.S. 71 (1971).

33. See Scheingold, The Politics of Rights, pp. 131-137.

34. Cleveland Board of Education v. La Fleur and Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974).

35. La Fleur v. Cleveland Board of Education, 465 F.2d 1184 a5 1186, 1188 (1972).

36. Cohen v. Chesterfield County School Board, 474 F.2d 395 at 397-398 (1972).

37. Aiello v. Hansen, 359 F. Supp. 792 (1973).

38. Geduldig v. Aiello, 417 U.S. 484 (1974).

39. Another major argument of the brief stressed the applicability of the Court's decisions on reproductive freedom, suggesting an analogy here since without compensation poor women will be forced to choose work or children. However, if the Court had taken this tack "the burden would have shifted with the State being required to show a compelling interest for its interference with so fundamental right as whether to bear or beget a child." "Recent Developments: Geduldig v. Aiello," 3 Hofstra Law Review 141,150-51, n.52 (1975).

    For a discussion of the importance of the choice of equal protection evaluation standard in terms of predicting a decision see Gerald Gunther, "Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harvard Law Review 1 (1972).

40. 350 F. Supp. 792 at 801 (1973).

41. 417 U.S. 484 at 496-497 (1974).

42. Id.
43.
43. Ibid., p. 500-501.

44. "Comment: Pregnancy Classification", p. 461.

45. Jacobs, Justice in America, p. 199-200.

46. "Comment: Pregnancy Classification", p. 466-467.

47. "Recent Developments: Geduldig v. Aiello," 3 Hofstra Law Review 141 at 147 (1975).

48. See "Comment: Pregnancy Classification", pp. 456-459; Seidenberg, "The Submissive Majority...", 55 Cornell Law Review 262 at 265-272 (1970).

49. Ruth Bader Ginsburg, "Realizing the Equality Principle," in Women and the Law: Symposium on Sex Discrimination (Philadelphia: Temple University School of Law, March, 1976), p. 26.

50. Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

51. Ibid., at 544

52. Id.

53. Ibid., at 545.

54. Transcript, Gilbert v. General Electric, Civil Action #142-72-R, U.S. District Court, Eastern District of Virginia, Richmond Division, Cross Examination of Robert Gordon Delano, p. 210.

55. Frontiero v. Richardson, 414 U.S. 677 at 692 (1973).

56. "Joint Petition of all Parties for a Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit," reprinted in Law Reprints, Labor Series, Volume 10, no. 4, 1976-77 term, p. 10. Unless otherwise indicated all briefs hereinafter are from this source.

57. This list is underinclusive in that many briefs, especially for the women's rights groups, are written jointly, but the official court reports only the lead organization, e.g., The Women's Legal Defense Fund participated in these briefs but its name doesn't appear. Because of the importance of the issues to the women's rights supporters almost all the Supreme Court amici also presented briefs at the appellate and or district court level. The policy aspect of this participation is indicated by the lack of any corporate or trade association amicus briefs in Nashville Bas v. Satty, 434 U.S. 136 (1977), the case which would either extend or limit the reach of Gilbert. The corporations felt secure in their Gilbert victory. A joint brief for women's rights organizations and one for the AFL-CIO supported Satty.

58. Data summarized from case materials in IUE files.

59. Brief for Martha V. Gilbert, IUE et. al., p. 182. The brief and its 92 page appendix cite 87 cases; 45 provisions from constitutions, statutes and regulations; 25 pieces of congressional materials and 43 miscellaneous law review articles, excerpts from government documents, etc.

60. General Electric v. Gilbert, Oral Argument, October 13, 1976, p. 29.

61. Ibid., p. 32.

62. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

63. General Electric v. Gilbert, Oral Argument, October 13, 1976, p. 12.

64. Muller v. Oregon, 208 U.S. 412 (1908).

65. Hoyt v. Florida, 368 U.S. 57 (1961).

66. Ginsburg, "Realizing the Equality Privilege," op. cit., p. 27.

67. See Baer, "Sexual Equality and the Burger Court," op, cit.; "Symposium: The Burger Court," 23 Emory Law Journal 643 (1974); Robert Steamer, "Contemporary Supreme Court Directions in Civil Liberties," 92 Political Science Quarterly 425 (1977); Wallace Mendelson, "From Warren to Burger: The Rise and Decline of Substantive Equal Protection," 46 American Political Science Review 1226 (1972).

68. 429 U.S. 125 at 157 (1976).

69. Ibid., p. 161-162 and Note 5. This is one of the most frequently cited quotations in the congressional debates on the issue.

70. Jeff Greenfield, "It's Time to Fight," Village Voice, December 20, 1976.

71. New York Times, December 8, 1976.

72. Ibid., December 10, 1976.

73. Kilpatrick column, December 17, 1976.

74. 519 F 2d 661, 669 (1975).

75. 44 USLW 3424 (January 27, 1976).

76. Id.

77. 429 US 125, 133 (1976).

78. Ibid., at p. 161, n. 3.

79. Information on the Campaign...'s activities are from Sue Ross' files unless otherwise noted.

80. See Senate Human Resources Committee Report on S995 reprinted in BNA's Daily Labor Report, full text section, August 9, 1977, p. 0-2. Cited hereinafter as Senate Committee Report.

81. U.S. Congress, Senate, Congressional Record (daily edition) September 15, 1977, p. S14991.

82. Ibid., September 16, 1977, p. S15050.

83. U.S. Congress, House of Representatives, Congressional Record (daily edition), July 18, 1978, p. H6863.

84. Id.

85. Senate, Hearings, p. 93.

86. All these groups were also members of the Campaign... .

87. See Senate Committee Report, p. D-3, D-4.

88. Testimony of David Fitzmaurice, President, IUE, Senate, Hearings, p. 231.

89. Ibid., p. 432.

90. Ibid., p. 495-496.

91. Congressional Quarterly Weekly Report, July 22, 1978, p. 1910.

92. See Judith Baer, "Sexual Equality and the Burger Court," p. 32-36.

93. Richard Funston, "Symposium: The Burger Court: Foreward," 23 Emory Law Journal 643, 649 (1974).

94. For an analysis of these categories of congressional action with other examples see "Congressional Reversal of Supreme Court Decisions: 1045-57," 71 Harvard Law Review 1324 (1958).

95. Senate, Committee Report, p. D-3.

96. House, Congressional Record, July 18, 1978, p. H6868.